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NEBUAD, INC.  
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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
23 DAN VALENTINE, et al.,  
Plaintiffs,  
vs.  
24 NEBUAD, INC., et al.,  
Defendants.  
25  
26  
27

No. C08cv-05113(TEH)(EMC)  
**JOINT CASE MANAGEMENT  
STATEMENT**

Date: June 28, 2010  
Time: 10:00 a.m.  
Hon. Thelton E. Henderson

Complaint Filed: November 10, 2008  
Trial Date: None Set

Pursuant to Fed. R. Civ. P. 26(f), the parties met and conferred on June 17, 2010. The telephonic conference was attended by:

- Scott A. Kamber and David A. Stampley of Kamberlaw, LLC, and Pete Kaufman of of Panish, Shea & Boyle, LLP on behalf of Plaintiffs;
- Jason Kravitz and Talley McIntyre of Nixon Peabody LLP on behalf of Defendant, NebuAd, Inc. (“NebuAd”) or “Defendant”);

In accordance with this Court’s standing order and Local Rule 16-9, the parties submitted their original joint Case Management Statement on November 9, 2009, and now submit the following updated report in preparation for the Case Management Conference scheduled for June 28, 2010, at which the parties will request the Court’s referral of this matter to a U.S. Magistrate Judge for mediation. Currently, this Case Management Conference is scheduled in conjunction with a hearing on a pending motion to dismiss on June 28, 2010 at 10:00 a.m. In light of the ongoing settlement efforts and requested referral to a U.S. Magistrate Judge to assist with mediation, the parties have filed under separate cover a joint stipulation requesting that the hearing on the motion to dismiss be continued until after the close of mediation if the parties are unable to reach settlement. The parties also requested in the joint stipulation that the Case Management Conference be moved from 10:00 a.m. until 1:30 p.m. in accordance with the Court’s Standing Order.

**1. Jurisdiction and Service**

All parties named in the action have been served.

**Defendant:** NebuAd does not challenge this Court’s exercise of personal jurisdiction over it, and does not dispute that this Court has subject matter jurisdiction over the claims asserted. NebuAd does not challenge the efficacy of service of the complaint.

**2. Facts and Contentions of the Parties:**

**Plaintiffs:** Plaintiffs allege that NebuAd is a California-based online advertising company. Plaintiffs are citizens of Illinois, Montana, Alabama, Kansas, and Georgia.

The basis of Plaintiffs’ complaint is that NebuAd contracted with ISPs to monitor and intercept without notice or consent the online communications of ISPs’ customers using an

1 intrusive and invidious technology known as Deep-Packet Inspection (“DPI”). By utilizing DPI,  
2 Defendants are able to examine every search term entered, every item viewed, every email sent,  
3 every credit card number entered in short, every click the users of ISPs make online. To do so,  
4 NebuAd installed devices directly in the data hubs of ISPs and diverted all of the collected  
5 subscriber data to NebuAd’s control, who utilized Deep Packet Inspection to alter impermissibly  
6 senders’ communications being transmitted to Plaintiffs. Plaintiffs contend that these activities  
7 violate the federal Electronic Communications Privacy Act (“ECPA”) and the Computer Fraud  
8 and Abuse Act (“CFAA”), and state law claims pursuant to the California Invasion of Privacy  
9 Act (“CIPA”) and California Computer Crime Law (“CCCL”), all prohibiting interference,  
10 interception, and wiretapping of internet communications.

11       **Defendant:** This lawsuit arises out of a practice of using collected internet interaction  
12 data for the purpose of delivering targeted advertisements based on consumer activity. NebuAd  
13 worked with certain internet service providers (“ISPs”) to install devices on the ISPs’ networks,  
14 which devices were capable of screening ISP subscribers’ internet activity. That data could  
15 theoretically be used to sell advertising tailored to subscribers’ interests, in place of more generic  
16 advertisements on web pages visited by subscribers.

17       Plaintiffs claim they are ISP customers whose online activities were allegedly monitored  
18 during trials of this technology by NebuAd and certain ISPs. Plaintiffs claim this practice  
19 violated federal and state statutes governing the privacy of communications and computer usage.

20       Plaintiffs filed a complaint on November 10, 2008 against NebuAd and certain ISPs,  
21 alleging violations of the federal Electronic Communications Privacy Act of 1986, 18 U.S.C. §  
22 2510 et seq.; California’s Computer Crime Law, Cal. Pen. Code § 502; the federal Computer  
23 Fraud and Abuse Act, 18 U.S.C. § 1030; and California’s Invasion of Privacy Act, Cal. Pen.  
24 Code § 630 et seq. Plaintiffs also charge ISPs with aiding and abetting the alleged statutory  
25 violations and with civil conspiracy, and they assert an unjust enrichment claim against all  
26 Defendants. NebuAd denies any and all wrongdoing and intends to put plaintiffs to their proof  
27 should the parties fail to reach a settlement.

28

1           On October 6, 2009, the court granted the ISP Defendants' Motions to Dismiss for lack of  
2 personal jurisdiction, leaving NebuAd as the lone remaining defendant in this action.

3           NebuAd had been struggling financially since before this action was filed. On May 13,  
4 2009, NebuAd's board of directors executed an assignment for the benefit of creditors ("ABC"),  
5 "a business liquidation device available to an insolvent debtor as an alternative to formal  
6 bankruptcy proceedings." *Credit Managers Ass'n v. Nat'l Indep. Bus. Alliance*, 162 Cal. App. 3d  
7 1166, 1169 (1984). The company's assets and documents have been assigned in trust to a  
8 fiduciary assignee, NebuAd, LLC (the "Assignee"), which is to liquidate its assets to pay off  
9 creditors. To share in the proceeds from the liquidation of NebuAd's property, creditors are  
10 required to file notice of their claims with the Assignee.

11           **Joint Principal facts in dispute:**

- 12           • The amount of information NebuAd gathered from ISP subscribers for ad serving  
13           purposes;
- 14           • The nature of information NebuAd gathered from ISP subscribers for ad serving  
15           purposes;
- 16           • The manner in which NebuAd gathered information from ISP subscribers for ad serving  
17           purposes;
- 18           • What notice was given to ISP subscribers regarding NebuAd's alleged gathering of  
19           information;
- 20           • What level of consent was given by the ISP subscribers;
- 21           • What harm, if any, did any ISP subscriber suffer as a result of the conduct alleged in the  
22           complaint.

23           **Defendant – Additional principal facts in dispute:**

- 24           • Plaintiffs' general internet habits relating to privacy and consent, i.e. whether they ever  
25           granted consent to allow their data to be used by third parties and, if so, under what  
26           circumstances.

1       3.     Legal Issues

2              The parties agree that the issue of whether or not any class may be properly certified  
3 under the requirements of Rule 23(b) is one of the primary issues in this case, and that other  
4 issues include:

- 5              • Whether the federal claims in Plaintiffs' Complaint can be applied to the Defendant ISPs  
6                  for the conduct complained of;
- 7              • Whether NebuAd owed the ISP subscribers a duty to disclose the fact and nature of the  
8                  DPI allegedly conducted by the NebuAd device with respect to their internet  
9                  communications;
- 10             • Whether consumers consented to DPI inspection of their internet communications;
- 11             • Whether conduct complained of constitutes a violation of the Electronic Communications  
12                  Privacy Act ("ECPA") and the Computer Fraud and Abuse Act ("CFAA"), and state law  
13                  claims pursuant to the California Invasion of Privacy Act ("CIPA") and California  
14                  Computer Crime Law ("CCCL"), both as to NebuAd, and separately, as to the Defendant  
15                  ISPs;
- 16             • Whether Defendant has been unjustly enriched by its allegedly unlawful conduct;
- 17             • Whether Plaintiffs lack standing under the California Invasion of Privacy Act ("CIPA")  
18                  because they are not California citizens. *See Cal. Pen. Code § 631(a); Kearney v.*  
19                  *Salomon Smith Barney*, 39 Cal. 4th 95, 104, 107 (2006) (disapproving of attempt to apply  
20                  California's invasion of privacy law to protect non-California citizens).
- 21             • Whether Plaintiffs lack standing under the California Computer Crime Law ("CCCL")  
22                  because they are not California citizens. *See Cal. Pen. Code § 502(a)* ("The Legislature  
23                  further finds and declares that protection of . . . computer data is vital to the protection of  
24                  the privacy of individuals . . . and others *within this state* that lawfully utilize those  
25                  computers, computer systems, and data) (emphasis added).
- 26             • Whether the federal Electronic Communications Privacy Act ("ECPA") preempts  
27                  plaintiffs' CIPA and CCCL counts. *See Bunnell v. Motion Picture Ass'n of America*, 567  
28                  F.Supp.2d 1148, 1154 (C.D. Cal. 2007) (holding the ECPA preempted plaintiff's parallel

1 CIPA claim). The ECPA preempts parallel state laws such as the CIPA and the CCCL,  
2 expressly and by “field preemption.” *Id.*

- 3 • The appropriate remedies if the conduct alleged in the Complaint supports liability under  
4 any of the claims in the Complaint, including the propriety of any monetary and/or  
5 injunctive relief requested by the Plaintiffs.

6 4. **Motions:**

7 a. **Pending Motions** (excluding *pro hac vice* admission motions)

- 8 • 12/22/08 (DKT 4) – **NebuAd’s Motion to Dismiss (this motion is still pending)**

9 b. **Anticipated Motions:**

10 **Plaintiffs:** Should the parties fail to reach settlement, Plaintiffs intend to file the  
11 following motions: Leave to file amended pleading if consent is not obtained; class certification;  
12 dispositive motions at the appropriate time.

13 **Defendant:** NebuAd is not presently aware of any motions it specifically intends to file.  
14 Should the parties fail to reach a settlement, NebuAd also anticipates the filing of one or more  
15 dispositive motions at the appropriate time.

16 5. **Amendment of the Pleadings**

17 **Plaintiffs:** Plaintiffs informed Defendant in November 2009 that as a result of responsive  
18 discovery and developments in the case, they will seek leave to file an amended pleading within  
19 30 days of filing the original Case Management Statement on November 9, 2009. Since that  
20 time, however, the parties have been engaged in good faith settlement negotiations, and Plaintiffs  
21 have not yet moved for leave to amend their pleadings.

22 **Defendant:** NebuAd does not presently anticipate amending its pleadings, but will of  
23 course respond to any amended pleadings filed by plaintiffs.

24 6. **Evidence Preservation**

25 **Plaintiffs:** Plaintiffs have sought preservation of all evidence and have a particular  
26 concern as a result of the status of the Defendant as well as the maintenance of electronic  
27 discovery.

28

1           **Defendant:** Upon information and belief, a litigation hold notice was sent to NebuAd  
2 shortly after this action was commenced.

3           Shortly after current counsel was retained, they learned that a company called Red Aril,  
4 Inc. (“Red Aril”) apparently acquired and took possession of certain NebuAd materials, possibly  
5 including electronic records stored on computer servers. Current counsel immediately sent a  
6 letter to Red Aril, requesting that it preserve any information obtained from NebuAd. Moreover,  
7 on November 3, 2009, counsel for NebuAd served a Notice of Deposition and a Subpoena to  
8 Testify at a Deposition on Red Aril. The subpoena was intended to ensure that Red Aril  
9 preserves any NebuAd information in its possession. On December 17, 2009, Defendant deposed  
10 Ray Avakian, Director of IT, Red Aril, Inc. regarding the asset transfer from NebuAd, Inc. to Red  
11 Aril and the preservation efforts related to documents, records, and electronic data involved  
12 during the asset transfer.

13           NebuAd does not have any information about what efforts, if any, have been made to  
14 preserve potentially relevant information in the possession, custody or control of the plaintiffs,  
15 including without limitation ESI.

16           **7. Disclosures**

17           As discussed at the November 10, 2009 Case Management Conference, Defendant served  
18 its initial disclosures on December 18, 2009. Plaintiffs have not yet served filed initial  
19 disclosures under F.R.C.P. 26(f).

20           **8. Discovery**

21           **a. Discovery Taken to Date.** On April 17, 2009, Plaintiffs served Special  
22 Interrogatories Set One and Requests For Production (Set One) on NebuAd. On May 20, 2009,  
23 NebuAd served responses and objections to this discovery. At the present time, Plaintiffs have  
24 received approximately 6,600 pages of hardcopy documents. On November 3, 2009, counsel for  
25 NebuAd served a Notice of Deposition and a Subpoena to Testify at A Deposition on Red Aril.  
26 On December 17, 2009, NebuAd deposed Red Aril representative.

1           **b. The Scope of Anticipated Discovery.** In the event the parties fail to reach  
2 settlement, the parties anticipate depositions, interrogatories, document requests, and other fact  
3 and expert discovery available under FRCP and Local Rules.

4           **c. Proposed Limitations or Modifications to the Discovery Rules.** At the present  
5 time, the parties do not anticipate limitations or modifications to the discovery rules.

6           **d. Proposed Discovery Plan Pursuant to Fed. R. Civ. P. 26(f).** Due to the ongoing  
7 efforts to reach settlement, the parties have not yet agreed on the general parameters of a  
8 discovery plan.

9           **9. Class Actions**

10          **Plaintiffs:** Plaintiffs provide the following class action information pursuant to L.R. 16-  
11 9(b):

12          a. This action is maintainable as a class action under Fed. R. Civ. P. 23(a) and (b)(1),  
13 (b)(2), and (b)(3).

14          b. The action is brought on behalf of the following Class initially defined as:

15              All Subscribers of ISPs utilizing NebuAd's services and whose internet  
16              communications were monitored, intercepted, accessed, copied,  
17              transmitted, altered and/or used at any time by or through a NebuAd  
18              device.

19          c. The following facts alleged in the Complaint demonstrate that this action is  
20 maintainable as a class action under Fed. R. Civ. P. 23(a) and (b):

21          **Numerosity** – While the precise number of Class members is unknown to Plaintiffs at  
22 this time, Plaintiffs estimate that the Class consists of tens of thousands of members.

23          **Common Questions** – There are numerous common questions of fact and law. The  
24 principal factual issues in dispute (Section 2 above) and points of law (Section 3 above) are  
25 common to all Class members, and predominate over any questions affecting Plaintiffs or other  
26 individual members of the Class.

1           **Typicality** – Plaintiffs' claims are typical of those of the Class. Plaintiffs and all Class  
2 members were subscribers of ISPs at the times in which and in the locations in which the  
3 Defendant ISPs activated the NebuAd device that intercepted their internet communications.

4           **Adequacy** – Plaintiffs have no interests adverse or antagonistic to those of the Class and  
5 have retained competent and experienced class counsel to prosecute the action.

6           **Superiority** – A class action is superior to all other available methods for the fair and  
7 efficient adjudication of this controversy because joinder of all members is impracticable.  
8 Furthermore, as the damages suffered by individual Class members may be relatively small, the  
9 expense and burden of individual litigation makes it impossible for members of the Class to  
10 individually redress the wrongs done to them. There will be no difficulty in the management of  
11 this case as a class action.

12           Additionally, the Class may be certified because:

- 13           • The prosecution of separate actions by the individual members of the Class would create a  
14 risk of inconsistent or varying adjudication with respect to individual Class members  
15 which would establish incompatible standards of conduct for NebuAd and the Defendant  
16 ISPs;
- 17           • the prosecution of separate actions by individual Class members would create a risk of  
18 adjudications with respect to them that would, as a practical matter, be dispositive of the  
19 interests of other Class members not parties to the adjudications, or substantially impair or  
20 impede their ability to protect their interests; and
- 21           • NebuAd and the Defendant ISPs have acted or refused to act on grounds generally  
22 applicable to the Class, thereby making appropriate final and injunctive relief with respect  
23 to the members of the Class as a whole.

24           d.       If the parties fail to reach settlement, barring substantial delays caused by  
25 discovery disputes, Plaintiffs anticipate bringing a motion for class certification.

26           **Defendant:** Should the parties fail to reach a settlement agreement, NebuAd expects to  
27 oppose any efforts to certify a class in this case, and subject to discovery, NebuAd expects to  
28 challenge each of the factors relevant to class certification.

1  
2      **10. Related Cases**

3            None.

4      **11. Relief**

5            **a. Plaintiffs:** Should the parties fail to reach a settlement agreement, Plaintiffs seek:

- 6            • An order certifying the Class, directing that this case proceed as a class action, and  
7            appointing Plaintiffs and their counsel to represent Plaintiffs and the Class;
- 8            • Judgment in favor of Plaintiffs enjoining NebuAd from engaging in DPI inspection of  
9            consumers' internet communications;
- 10          • Judgment in favor of Plaintiffs requiring NebuAd to cleanse all systems of all data  
11          obtained through the NebuAd device and enjoin any party of third party from any use of  
12          said data;
- 13          • Judgment in favor of Plaintiffs and Class members in an amount of actual damages,  
14          compensatory damages, or restitution to be determined at trial;
- 15          • Judgment in favor of Plaintiffs and Class members for statutory damages in an amount to  
16          be determined at trial;
- 17          • An order granting reasonable attorneys' fees and costs, as well as pre- and post-  
18          judgment interest at the maximum legal rate; and
- 19          • Such other and further relief as this Court may deem appropriate.

20            **b. Defendant:** Should the parties fail to reach a settlement agreement, Defendant  
21          seeks:

- 22          • Dismissal of the Complaint with prejudice and/or entry of judgment in favor of NebuAd;
- 23          • An award of its costs of suit and reasonable attorneys fees; and
- 24          • Other such relief as the Court deems just and appropriate.

25            If liability is imposed, NebuAd would defer to its expert witness(es) to formulate the  
26          appropriate methodology for calculating damages, if any.

1      **12. Settlement and ADR**

2      The parties participated in a private mediation with JAMS. Plaintiffs and NebuAd remain  
3      willing to continue that process. Since the initial Case Management Conference, the parties have  
4      been diligently engaged in settlement discussions in person and by telephone. The negotiations  
5      are multifaceted and involve the interests of parties and certain non-parties. The discussions have  
6      included the parties themselves as well as the insurance carriers. However, after several months  
7      of in-person and telephonic discussions and exchanges of draft agreements, the parties jointly  
8      represent their belief that the parties have reached an impasse in settlement negotiations. The  
9      parties believe that the intervention of the Court may facilitate resolution and jointly request  
10     reference to a U.S. Magistrate Judge for mediation.

11     **13. Consent to Magistrate Judge For All Purposes**

12     The parties do not, at this time, consent to have a magistrate judge conduct all further  
13     proceedings including trial and entry of judgment. However, NebuAd respectfully asks that it be  
14     permitted to reserve the right to change its position in the future.

15     **14. Other References**

16     At this time, the parties do not believe this case is suitable for reference to binding  
17     arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

18     **15. Narrowing of Issues**

19     Without the benefit of fact and expert discovery, the parties do not believe that the issues  
20     can be narrowed at this time. Should the parties fail to reach settlement, after a ruling on the  
21     anticipated motion to dismiss and appropriate discovery, the parties are willing to further meet  
22     and confer regarding whether any narrowing of the factual or legal issues, including issues  
23     related to class certification, can be achieved by way of voluntary agreement.

24     **16. Expedited Schedule**

25     The parties believe this case cannot be expedited at this point.  
26  
27  
28

1       **17.**     Scheduling. If the Court refers this matter to mediation which does not result in  
2                          resolution, the parties shall submit their proposed scheduling order within 14 days of the  
3                          termination of mediation.

4       **18.**     Trial

5                          The parties have requested trial by jury of all issues so triable. The parties estimate that a  
6                          trial would take approximately two weeks, but believe it is premature to schedule a trial date until  
7                          the Court rules on whether this case should be certified. After the Court has ruled on  
8                          Certification, the parties will reconvene and jointly submit a proposed trial date.

9       **19.**     Disclosure of Non-party Interested Entities or Persons

10      a.        Plaintiff: Plaintiffs did not disclose any persons or entities other than Plaintiffs  
11                          and Defendant.

12      b.        Defendant: NebuAd filed the “Certification of Interested Entities or Persons”  
13                          required by Civil Local Rule 3-16 on April 15, 2009. (DKT 98). Pursuant to Civil L. R. 3-16,  
14                          NebuAd certified that the following listed persons, associations of persons, firms, partnerships,  
15                          corporations (including parent corporations) or other entities (i) have a financial interest in the  
16                          subject matter in controversy or in a party to the proceeding, or (ii) have a non-financial interest  
17                          in that subject matter or in a party that could be substantially affected by the outcome of this  
18                          proceeding:

19       **AXIS Surplus Insurance Company**

20       Identification of Connection/Interest: NEBUAD INSURANCE CARRIER

21       **St. Paul Travelers/St. Paul Fire & Marine Insurance Company**

22       Identification of Connection/Interest: NEBUAD INSURANCE CARRIER

23                          In light of the ABC NebuAd executed in May 2009, NebuAd LLC and/or Sherwood  
24                          Partners LLC (the assignee(s)) should also be identified as a non-party interested entities.

25  
26       **20.**     Other Matters

27       At this time, there are no other matters that may facilitate the just, speedy, and  
28                          inexpensive disposition of this matter.

1  
2 Dated: June 21, 2010  
3  
4

Respectfully submitted,

KamberLaw, LLC

5 By: /s/ David A. Stampley  
6 DAVID A. STAMPLEY  
7 Attorneys for Plaintiffs  
8  
9 Nixon Peabody LLP  
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Dated: June 21, 2010

By: /s/ Talley E. McIntyre

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18 Additional Attorneys for Plaintiffs

19 GENERAL ORDER 45 CERTIFICATION

20 I, David A. Stampley, hereby attest pursuant to N.D. Cal. General Order No. 45 that the  
21 concurrence to the filing of this document has been obtained from each signatory hereto.

22 Dated: June 21, 2010

KamberLaw, LLC

23  
24 By: /s/ David A. Stampley  
25 DAVID A. STAMPLEY  
26 Attorneys for Plaintiffs  
27  
28